In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

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No. 1764

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

LOUIS AYTCH, Supt.
Phila. County Prisons,
Petitioner

v.

GEORGE WALTON,
Respondent

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

In his brief opposing certiorari, respondent asserts that:

> [T]his Court, most respectfully, is bound by the finding of the lower court, absent clear evidence to the contrary, that the twelfth juror was permanently discharged on the evening of December 3, 1974; that circumstances precluded her from being brought back under the conditions of sequestration that existed at the time . . .

Respondent's brief at 10.
Neither the habeas corpus court nor the Supreme Court of Pennsylvania made any finding even similar to the assertion that

"circumstances precluded her from being brought back under the conditions of sequestration that existed at the time..." However, those courts did conclude (after reviewing the cold record equally available to this Court[1]) that the mistrial occurred when the juror was sent home. The habeas corpus court never addressed itself to the issue whether the juror sent home could have been returned to service. That court simply reasoned:

> In studying the facts before us, this court reaches the conclusion that the mistrial occurred the evening of December 3, 1974. At that time relator's options were seriously limited. When he appeared in court the next morning, relator had already been deprived of the twelve man jury he had chosen to determine his fate . . . When the juror was removed ex parte, it is clear to this court that a mistrial had occurred.

(21a-22a)

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1 As was pointed out in Superintendent Aytch's Petition, the trial judge did not entertain respondent's petition for writ of habeas corpus. Instead, the matter was assigned to another judge of the Philadelphia Court of Common Pleas.

The Pennsylvania Supreme Court, on the other hand, reasoned:

> First, the trial judge must have viewed his action of allowing the juror to return home as a discharge of the juror because had he viewed his action as merely excusing the one juror from sequestration, he could have returned the juror over the objection of defense counsel. Thus, since the juror was discharged when she was allowed to return home, the possibility of returning her did not exist.

(4a). (footnote omitted).

However these conclusions by the state courts may properly be designated, it is at once clear that they are not the sort of findings of historical fact which are binding here unless they be unsupported. Rather they are, at most, inferences which this Court must reject if they are not properly inductable from the uncontested historical facts. Cf. Culombe v. Connecticut, 367 U.S. 603-606 (1961). Nonetheless, when tested by either standard, the "finding" urged here by respondent cannot be sustained. The trial court stated on the morning of December 4, that he had sent the juror home the night before but that she had not been "specifically discharged." (93a). He heard lengthy argument from both counsel on the advisability of returning her to jury service if she had not been exposed to any outside influence. (91a-100a). There was also extensive discussion of the option of proceeding with eleven jurors. Finally, as was pointed out in the dissenting opinion of Mr. Justice Pomeroy, the other jurors were not

dismissed until December 4. (6a at n.*) The only conclusion which can be drawn from these historical facts is the mistrial was declared when it was declared, on December 4. (100a). The only straw of support for the conclusion that the mistrial occurred the previous night lies in defense counsel's insistence to that effect in his argument to the trial judge. (88a). To insist that the world is flat will not make it so.

Respectfully submitted,

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